No. 48807-8 II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WASHINGTON RESTAURANT ASSOCIATION; NORTHWEST GROCERY ASSOCIATION AND COSTCO WHOLESALE CORPORATION

Appellants

v.

WASHINGTON STATE LIQUOR AND CANNABIS BOARD, et al,

Respondents

and

ASSOCIATION OF WASHINGTON SPIRIT & WINE DISTRIBUTORS,

Intervenor-Respondent

REPLY BRIEF OF INTERVENOR-RESPONDENT

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I. INTRODUCTION

Respondent and Cross-Appellant Association of Washington Wine & Spirits Distributors respectfully submits this reply brief in support of their cross-appeal seeking reinstatement of the rule limiting sales of spirits and wine by off-premises retailers to 24-liters per day.

The "24-Liter Rule" is one of multiple rules that safeguard Washington's "three-tier" regulatory system governing the distribution and sale of alcohol through the licensing and regulation of manufacturers, distributors, and retailers. Under the three-tier system, suppliers and distributors of alcohol are barred from holding retail licenses and retailers are barred from holding licenses as suppliers or distributors. The presence of distributors in this system is meant "to prevent manufacturers from exerting undue influence upon retailers and to provide an efficient means of tax collection." *Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 648-49, 278 P.3d 632 (2012). AWSWD represents members of this middle, distributor tier.

Contrary to Petitioners' assertions, I-1183 did not abolish Washington's three-tier system. It converted the spirits retailing tier from government owned and operated stores to privately owned and operated stores, and it extended the three-tier system to spirits by creating spirits

distributor licenses to permit private sector distribution. *See* Laws of 2012, ch. 2, § 102(d) (I-1183 will "allow a private distributor of alcohol to get a license to distribute liquor ... and create provisions to promote investments by private distributors.").

The 24-Liter Rule is integral to the system's proper functioning. The trial court's invalidation of the rule opens the door for Costco and others to encroach on the businesses of AWSWD's members and jeopardizes the three-tier system the voters intended to preserve. Indeed, Petitioners challenged the 24-Liter Rule because they knew invalidation of the rule would permit them to effectively act as unlicensed distributors and alter the competitive conditions of the marketplace in their favor.

The Superior Court below concluded "that the 24 liter limitation makes much more sense with a 'per day' limitation" and "agree[d] that the 24 liter rules with a 'per day' restriction may actually be more consistent with the overall statutory scheme than I-1183's original statutory language. Without question, the 24 liter rules would be more meaningful with the inclusion of 'per day' restriction." CP 825-26. This is correct. However, the trial court's ultimate conclusion – that the Board exceeded its authority in promulgating the rule – is incorrect.

II. THE ASSOCIATION HAS STANDING

Petitioners challenge AWSWD's standing to bring this cross-appeal, arguing that AWSWD is not aggrieved by the invalidation of the 24-Liter Rule. This is false. The trial court's decision undermines an important feature of the three-tier system, compromising a privilege granted to distributor licensees. AWSWD's members' pecuniary interests have been affected and they have standing.

AWSWD is a not-for-profit trade organization. The majority of spirits sold in the state of Washington are distributed by AWSWD members. All AWSWD members are licensed as spirits and/or wine distributors. The invalidation of the 24-Liter Rule allows Petitioners to act as *de-facto* unlicensed distributors, free to distribute an unlimited amount of spirits and wine to on-premise spirits retailers. At the public hearing to discuss the 24-Liter Rule, Costco acknowledged that without a per-day restriction it could effectively distribute an unlimited amount of spirits and wine per day, provided it was rung up 24 liters at a time:

> [Board Member]: So if, let me, I don't believe Costco does delivery, but let me take this one step further.
>
> [Costco Attorney]: Actually they do delivery.
>
> ...
>
> [Board Member]: ... So by the same token, if I take an order over the phone and it's,

someone says, you know, I want 24 liters, 24 liters, and 24 liters, I could palletize it, load it on a truck, have it delivered and in fact, I think by your interpretation, couldn't I actually write one check for all three invoices? Or at Costco is the policy that if I take your orders three, orders, yeah, using my 72 liter example and you're saying we're gonna ring it up as three 24 liter sales or transactions, can I write one check for that?

[Costco Attorney]: At the front, no, three transactions means three tender times.

[Board Member]: Okay. So again, so it's three different totals that are presented to me and I have to write three different checks.

[Costco Attorney]: Three single sales.

[Board Member]: Mm-hmm, okay.

CP 542-43. Because invalidating the 24-Liter Rule allows Petitioners to effectively distribute unlimited amounts of spirits and wine, AWSWD members have been aggrieved by the trial court's action.

An aggrieved party is one "whose personal right or pecuniary interests have been affected." *State v. Taylor*, 150 Wn.2d 599, 603, 80 P.3d 605 (2003). In a case predating the RAP, the Washington Supreme Court explained that one can appeal provided he/she

> has a substantial interest in the subject matter of that which is before the court and is aggrieved or prejudiced by the

> judgment or order of the court. Some personal right or pecuniary interest must be affected. The mere fact that one may be hurt in his feelings, or be disappointed over a certain result, or feels he has been imposed upon, or may feel that ulterior motives have prompted those who instituted proceedings that may have brought about the order of the court of which he complains does not entitle him to appeal.

Sheets v. Benevolent & Protective Order of Keglers, 34 Wn.2d 851, 855, 210 P.2d 690 (1949).

Here, AWSWD members are aggrieved parties for purposes of appellate standing. By invalidating the 24-Liter Rule and allowing Costco and Petitioners to become *de facto* unlicensed distributors, the trial court altered the competitive conditions of the marketplace to favor Petitioners and disadvantage AWSWD's members. It is not merely that AWSWD members' feelings are hurt or that they are disappointed by the trial court ruling; rather, AWSWD's members' pecuniary interests are impacted by the invalidation of the 24-Liter Rule in a real and substantive way.

The two cases Petitioners rely on to argue AWSWD members do not have standing are easily distinguished and do not govern under the circumstances here. Petitioners make much of the fact that the Board did not appeal the trial court's ruling invalidating the 24-Liter Rule, citing to *Terrill v. City of Tacoma*, 195 Wash. 275, 80 P.2d 858 (1938), and *Hollingsworth v. Perry*, __ U.S. __, 133 S.Ct. 2652, 186 L.Ed.2d 768

(2013), to support its argument that AWSWD is not an aggrieved party because the Board did not appeal. This is a red herring. None of the cases Petitioners rely on support this assertion. Rather, the cases they cite stand for the proposition that so long as an intervening party is aggrieved by a trial court's ruling, the party has standing on appeal.

First, Petitioners cite *Terrill* for the proposition that an intervenor may not appeal a trial court ruling when the party on whose side they intervened does not appeal. However, Petitioners misrepresent the holding of the case. The underlying claims in *Terrill* involved a challenge to procedures the City of Tacoma had used with respect to a referendum petition. The appellant moved to intervene as a defendant and the motion was not opposed. Following judgment enjoining the city from proceeding further with the referendum petition, the intervenor appealed and the respondent moved to dismiss the appeal on the basis that the intervenor had no appealable interest. *Id.* at 276. The Washington Supreme Court addressed whether the intervenor had standing to pursue the appeal.

The *Terrill* Court began its analysis by recognizing that the standard for appealing a decision of the superior court in Washington is whether the party is aggrieved – i.e., the party must have a "substantial interest in the subject matter of the action and is affected or injured by the judgment of the trial court." *Id.* at 277. The court then noted that the

mere fact no one objected to appellant's intervention at the trial court level did not make such intervention proper. Appellant still had to show she had an interest in the subject matter of the suit. *Id.* at 276. The court then noted that she had never shown such an interest:

> She introduced no testimony to show her interest. It does not appear from the record that she is a resident of Tacoma nor interested in any way in the ordinance or the success of the recall petition.... Her interest, as far as the record discloses, is left entirely to speculation.

Id. at 276-77. Because appellant had no interest in the subject matter of the case, the court determined she was not aggrieved by the trial court's ruling. *Id.* The fact that Tacoma did not appeal the trial court decision, and the fact that the purported appellant was an intervener at the trial court level, had no bearing on the Supreme Court's analysis in *Terrill*.

Unlike the appellant in *Terrill*, here AWSWD members (all of whom pay for the privilege to distribute spirits and/or wine in Washington) had a real pecuniary interest in the subject matter at the trial court level. Petitioners' attempt to invalidate the 24-Liter Rule jeopardized the businesses of the Association's members and the three-tier system the voters intended to maintain. This interest remains at the appellate level now that that 24-Liter Rule has been invalidated.

The other case Petitioners cite to argue AWSWD does not have standing, *Hollingsworth* (the California "Proposition 8" case), also has no

applicability here. In that case, after the federal district court declared Proposition 8 unconstitutional and enjoined California officials from enforcing it, proponents of Proposition 8 appealed. The Ninth Circuit affirmed the district court, holding the Proposition unconstitutional. *Id.* at 2660-61. Upon accepting review, the Supreme Court directed the parties to also brief and argue "[w]hether the petitioners have standing under Article III, § 2, of the Constitution in this case." *Id.* at 2661.

The *Hollingsworth* court explained that Article III of the Constitution confines the judicial power of federal courts to deciding actual "Cases" or "Controversies." *Id.* This means a person invoking the power of a federal court must demonstrate standing to do so. *Id.* To have standing, a litigant must seek relief for an injury that affects him/her in a "personal and individual way." *Id.* at 2662 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). He/she must possess a "direct stake in the outcome" of the case. *Id.*

The *Hollingsworth* court noted that "here, however, petitioners had no 'direct stake' in the outcome of their appeal. Their only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law." *Id.* The court continued, stating:

> We have repeatedly held that such a "generalized grievance," no matter how sincere, is insufficient to confer standing. A litigant "raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangible benefits him than it does the public at large – does not state an Article III Case or controversy."

Id. (quoting *Lujan*, 504 U.S. at 573–74, and citing *Lance v. Coffman*, 549 U.S. 437, 439, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007) ("Our refusal to serve as a forum for generalized grievances has a lengthy pedigree."); *Allen v. Wright*, 468 U.S. 737, 754, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) ("an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court"); *Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 67 L.Ed. 1078 (1923) ("The party who invokes the [judicial] power must be able to show ... that he has sustained or is immediately in danger of sustaining some direct injury ... and not merely that he suffers in some indefinite way in common with people generally.")). As was the case with regard to the Washington Supreme Court's analysis in *Terrill*, the fact that the state of California chose not to appeal the Ninth Circuit's decision did not influence the court's standing analysis in *Hollingsworth* at all.

Here, unlike the appellants in *Hollingsworth* (and the appellants in the cases cited in *Hollingsworth*), AWSWD members' have a

particularized and identifiable grievance. Except for a limited number of minor exceptions, only those licensed in Washington to distribute spirits and wine may do so. AWSWD members pay for the privilege of distributing spirits and wine in Washington. They have done so based in part on the reasonable presumption that Costco and others would not be permitted to distribute an unlimited quantity of liquor to retailers without obtaining their own distributors' licenses. The Board recognized this when it promulgated the 24-Liter Rule: "[W]holesalers should rely on the expectation that the LCB will act to insure that those not licensed to act as distributors (except under those exceptions allowed under the initiative) are prevented from doing so." CP 214. The trial court's invalidation of the 24-Liter Rule turns this presumption on its head and significantly alters the competitive conditions of the market.

This is not a case of citizens challenging a generally applicable law based on a generalized or abstract grievance. This is a case of parties who have purchased a specific license to participate in a regulated marketplace with the understanding that the license would afford them certain rights challenging a trial court decision that significantly compromises one of those rights. Thus, it is a case of parties seeking review of a trial court order that directly affects their pecuniary interests.

Finally, Petitioners argue that "[d]espite the years since the Per Day Rule was invalidated, the Association does not discuss a single concrete harm they are suffering from the lack of a Per Day Rule." Reply Br. of Appellant, at 26. This is a disingenuous argument. At the time the record was set in 2013 the 24-Liter Rule had not yet been invalidated and thus there was no showing of examples of harm in the record. Petitioners' challenge to the rule demonstrates Petitioners' belief that invalidation of the rule would result in increased sales to on-premises retailers by Costco and other off-premises retailers. This necessarily comes at the expense of AWSWD members. Since the record has never been reopened, there has been no opportunity for any party to present evidence about the impact of having the rule invalidated.

III. THE STATUTE IS AMBIGUOUS AND THE 24-LITER RULE IS CONSISTENT WITH THE INTENT OF THE VOTERS.

Petitioners also argue that RCW 66.24.630 and RCW 66.24.360 are unambiguous – i.e., the voters knew that Costco and Petitioners could effectively sell an unlimited amount of liquor per day under the 24-Liter Rule. This is incorrect. The Initiative was not even clear to stakeholder distributors and their counsel, who had knowledge of negotiations surrounding the drafting of the Initiative and of the language of the final Initiative. They understandably did not believe that I-1183 permitted

Costco and Petitioners to distribute an unlimited amount of liquor, as was made evident at the public hearing to discuss the 24-Liter Rule:

> [AWSWD Attorney]: ... [I]t never occurred to me that [Costco's attorney] or anyone else would walk into this room and say ha, we got you. You agreed to a 24 case or 24 liter limit and it really is no limit. Shame on you. That is absolutely absurd. That is not what was agreed to. I have an e-mail from [Costco's attorney] in March of 2011 saying that he had just reached an agreement with the Restaurant Association on a limit of, its to allow a two-case limit on retail to restaurant, bar sales.
>
> ...
>
> ... Anyways he said they voted on it to allow a two case 24 liter limit on retail to restaurant and bar sales. Clearly at that time none of us was thinking that this was a complete sham. And frankly, it doesn't matter what the drafters thought about, what they talked about, whether the Restaurant Association thought they were, they were putting something over on people or whether Costco thought they were, doesn't matter. What matters is what the initiative says, what the statute says and the statute says there is to be a 24 liter limit and I submit that that limit has to be interpreted in a way that makes some sense out of it.... As far as public policy reasons go, you have reasons for having distributors and retailers and distillers in separate

> tiers. If Costco wants to sell that quantity of spirits to people let 'em get a distributor's license. But they can't function as a distributor under this sham exception.

CP 543-44. Like the distributors, the average informed voter reading the language of the Initiative would have believed that it created a substantive, meaningful limitation. The Board, reading the Initiative similarly, adopted a rule that made the limitation approved by the voters meaningful rather than empty and illusory.

Petitioners' argument hinges entirely on their assertion that the "plain language" of the 24-liter limitation controls and that the Board erred in "adding" the per-day language to the rule. This argument exalts form over substance, and further emphasizes the "gotcha" nature of Costco's approach to the initiative. While it can be argued that the word "sale," considered in isolation, is unambiguous, there is no plausible argument that the entire provision at issue is unambiguous when it simultaneously provides that "no single sale may exceed twenty-four liters" and then makes an "exception" so that sales by former contract stores are unlimited. RCW 66.24.630(1); RCW 66.24.360(2). The "plain language" of the provision as a whole underscores that the 24-liter limit was a genuine, substantive limit, which is precisely what the Board concluded in adopting the 24-Liter Rule.

Petitioners argue that the voters who approved I-1183 "knew that more than one sale could occur in a day" and that this justifies their interpretation of the rule. Reply Br. of Appellants, at 28. However, the People knew that an on-premises retailer could purchase spirits or wine from a wide range of off-premises retailers. This introduces another element of ambiguity, because it is not clear whether a "single sale" means what Petitioners argue, or instead refers to transactions between a single off-premises retailer and a single on-premises retailer. AWSWD submits that the latter reading of the statute is far more plausible, when read in conjunction with the explicit rejection of any limit on sales by former state or contract stores to on-premises retailers.

Finally, Petitioners' argue that their interpretation of the Initiative should control because they provided this interpretation to the Board prior to the election. Reply Br. of Appellants, at 34; CP 746-48. This argument is nonsensical. If anything, the record serves to show that the Board, understanding that the voters intended for there to be in place a substantive limitation on sales of spirits from Costco and others to on-premises spirits retailers, and understanding that the voters intended that the three-tier system be maintained, rejected Petitioners' self-serving interpretation and interpreted the Initiative in a manner consistent with the Initiative's overall scheme.

In essence, Petitioners argue that this Court should invalidate the rule because, in their view, the "plain meaning" of one word in the section controls over the "plain meaning" of the section considered as a whole. This argument must fail.

IV. THE BOARD HAD AUTHORITY TO PROMULGATE THE 24-LITER RULE.

Petitioners argue that the Board lacked the authority to promulgate the 24-Liter Rule. This argument is incorrect. As discussed in AWSWD's Response Brief, the Board retained the express authority to "regulate the sale of liquor." And like any agency it has the power to issue rules "to 'fill in the gaps' in legislation if such rules are 'necessary to the effectuation of a general statutory scheme.'" *Wash. Pub. Ports Ass'n* v. *State Dep't of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003) (citations omitted). The Initiative left these powers untouched.

RCW 66.08.030 specifically provides that "[t]he power of the board to make regulations under chapter 34.05 RCW extends to ... (6) [r]egulating the sale of liquor kept by the holders of licenses which entitle the holder to purchase and keep liquor for sale." This power easily embraces the 24-liter-per-day limitation on "the sale of liquor" by "holders of licenses" contained in WAC 314-02-102 and WAC 314-02-106. The plain text of RCW 66.08.030(6) extends the "power of the board" to

precisely the sort of "regulations" of the "sale of liquor" that WAC 314-02-102 and WAC 314-02-106 represent. This is not supplying a deficiency; rather it is reasonably interpreting a statute to give meaning to the Initiative as a whole.[1]

Petitioners' arguments are disingenuous at best. In challenging the Sell-and-Deliver Rule and the authority of the Board in general, Petitioners urge the Court to completely ignore the literal meaning of the pertinent section of the statute and focus entirely on the context in which that section appears – and a very restrictive interpretation of the context, at that. This is diametrically opposed to the approach Petitioners take in challenging the 24-Liter Rule, where Petitioners urge the Court to adopt an extremely literal interpretation of a single phrase in the statute and completely ignore the context in which that phrase appears.

The fact is that Petitioners have it wrong in both cases. In looking at the 24-liter limit, the Court should assess the entirety of the statutory provision in which it appears, as well as consider the specific words used, in order to determine whether the Board's rule is valid. AWSWD submits

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[1] Petitioners argue that RCW 66.24.055(3)(d), which specifically directs the Board to make rules regarding collection of fees owed on retail-to-retail sales, somehow lessens the Boards' statutorily-granted authority. It does not. RCW 66.24.055(3)(d) establishes that a retail licensee selling for resale must pay a distributor licensee fee on resales of spirits that have not yet been subject to a distributor license fee and directs the Board to adopt rules regarding the frequency and timing of payments and reporting. It in no way restricts the Board's authority to otherwise act.

that doing so will inexorably lead to the conclusion that the Board acted properly and the trial court erred in striking the rule.

Similarly, in assessing the extent to which the statute as amended by I-1183 grants the Board authority to act, the Court should assess the specific language ***and*** the context in which it appears. The context is preliminarily established by the heading of RCW 66.08.050: "Powers of board in general." More to the point, the language of RCW 66.08.050(8) establishes beyond reasonable dispute that the section is addressing the powers of the Board in the broadest terms.

> The board, subject to the provisions of this title and the rules, **must**:
>
> . . .
>
> (8) Perform all other matters and things, **whether similar to the foregoing or not**, to carry out the provisions of this title, and has full power to do each and every act necessary to the conduct of its regulatory functions, including all supplies procurement, preparation and approval of forms, and **every other undertaking necessary to perform its regulatory functions whatsoever**, subject only to audit by the state auditor. However, the board has no authority to regulate the content of spoken language on licensed premises where wine and other liquors are served and where there is not a clear and present danger of disorderly conduct being provoked by such language or to restrict advertising of lawful prices.

(Emphasis added).

Petitioners attempt to denigrate this language, pointing to the reference to procuring supplies and preparing forms to claim that it

addresses only ministerial tasks. However, their reading of the statute ignores the sweeping nature of the language used in the provision. The statute does not say the Board can do a few things; it says the Board "must" do "all other matters and things, **whether similar to the foregoing or not**." It is impossible to read this language as limited in any way. Moreover, if the drafters of the Initiative (which is to say, Petitioners) actually wanted the People to strip the Board of all authority they could easily have proposed amendments to this section. The fact that they did not do so, yet now argue that passage of I-1183 somehow transformed the powers of the Board *sub silentio*, is just another example of Petitioners' "gotcha" approach to I-1183 and its interpretation.

V. CONCLUSION

For the reasons discussed above and in AWSWD's Response Brief, the Court should reverse the trial court's determination that the 24-Liter Rule is invalid, and reinstate that rule.

RESPECTFULLY SUBMITTED this 28th day of October, 2016.

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CERTIFICATE OF SERVICE

I, Gina A. Mitchell, declare that on October 28, 2016, I caused the foregoing pleading together with this Declaration of Service, to be served on counsel for all parties as follows:

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I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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